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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 491

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

LORAINE T. RICKENBERG, EXECUTRIX OF THE ESTATE OF EDWIN W. RICKENBERG, DECEASED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit which was entered in the above-entitled case on August 22, 1949, and which reversed in part the decision of the Tax Court of the United States.

OPINIONS BELOW

The opinion of the Tax Court (R. 14-42) is reported at 11 T.C. 1. The opinion of the Court of Appeals (R. 227-233) is reported at 177 F. 2d 114.

JURISDICTION

The judgment of the Court of Appeals was entered on August 22, 1949 (R. 233). By order

of Mr. Chief Justice Vinson dated November 15, 1949, the time within which a petition for a writ of certiorari might be filed was extended to and including December 20, 1949 (R. 234). The jurisdiction of this Court is invoked under the provisions of 28 U.S.C., Section 1254.

QUESTION PRESENTED

On October 21, 1942, Congress provided with respect to transfers in contemplation of death (Section 811(c)), among other things, that "a transfer of property held as community property by the decedent and surviving spouse * * * shall be considered to have been made by the decedent * * *." (Section 811(d) (5) of the Internal Revenue Code, as added by Section 402(a) of the Revenue Act of 1942, c. 619, 56 Stat. 941-942.) This provision was complementary to another (Section 811 (e)(2)), sustained by this Court in *Fernandez* v. *Wiener,* 326 U.S. 340, and *United States* v. *Rompel,* 326 U.S. 367, under which there is included in the decedent's estate, with exceptions not here relevant, all of the community property to the extent of the interest therein of the decedent and the surviving spouse. Six weeks after the enactment of these provisions, decedent and his wife, in contemplation of death, transferred their California community property to themselves as tenants in common. In determining what property so transferred should be included in decedent's estate for estate tax

purposes, decedent having predeceased his wife, the court below held that the nature of California community property acquired after July 29, 1927, is such that the 1942 division accomplished no transfer of, and so permits the exclusion of, the wife's half of the property. To reach that result, the court below found it necessary to strike down a Treasury Regulation explicitly providing that the division, in contemplation of death, of community property into separate property held in common falls within Section 811(c) and (d)(5) of the Internal Revenue Code as a transfer of all the property by the decedent, with the consequence that the wife's half of the property, as well as the decedent's half, is includible in decedent's gross estate. Section 81.15 of Treasury Regulations 105.

The question presented is whether the court below erred in rejecting the regulation and permitting a division of the community property, in contemplation of death, to change the tax consequences which would have followed had the division been postponed until decedent's actual death.

STATUTES AND REGULATIONS INVOLVED

The relevant statutory provisions and regulations are printed in the Appendix, *infra*, pp. 16-29.

STATEMENT

The facts found by the Tax Court (R. 15-28), in so far as they are here pertinent, may be summarized as follows:

Decedent and Loraine T. Rickenberg were married on July 17, 1913, and lived together thereafter as husband and wife, mostly within California, until decedent's death on August 23, 1944 (R. 15). For a number of years after their marriage, decedent and his wife had merely enough to pay household running expenses. Thereafter, and prior to December 2, 1942, the decedent acquired the community property involved in this case, having an agreed total value of $345,696.63. None of the property was received as compensation for personal services rendered by his wife or was derived from such compensation or from any separate property of hers. (R. 17-18.)

On December 2, 1942, decedent and his wife executed an agreement which recited that all of their property was community property and in which they agreed to convey such property to themselves as tenants in common. The agreement stated that its purpose was the acquisition and ownership by decedent and his wife of one-half of the property as his or her separate property so that upon the death of one party the other might retain the property without disturbance of title, that each might dispose of or convey his property during life without the interference or consent of the other, and that each might receive the income from his property as separate property. On the same date, decedent and his wife transferred the property to themselves as tenants in common and drew new wills, each giving a life

estate in his or her property to the surviving spouse, with remainders to their two children equally. (R. 23-25, 26-27.)

The Tax Court found that the property transferred on December 2, 1942, was community property; that it was transferred in contemplation of death since the primary motive was to avoid estate taxes; and that the agreement dividing the community property into separate property held in common was not a bona fide sale for full and adequate consideration in money's worth (R. 27-28). Accordingly, it held, three judges dissenting, that the value of the community property [1] was includible in decedent's gross estate as a transfer in contemplation of death under Section 811 (c) and (d)(5) of the Internal Revenue Code. (R. 28-42.)

The Court of Appeals affirmed the holding of the Tax Court that the 1942 transfer was made in contemplation of death (R. 231-232). It drew a distinction, however, between the community property acquired before July 29, 1927, and that acquired after that date. As to the property acquired before July 29, 1927, the Court of Appeals affirmed the Tax Court, holding that the entire value of this property is includible in the

[1] The includibility of the half of this property acquired by the decedent as separate property in the 1942 division of the community property is not in issue in this case, since this property was held at death. (R. 4, 10-11, 47, 49, 50.) The controversy between the parties is whether the value of the wife's half interest in the community property is to be included in the gross estate.

gross estate because the wife, who had only an expectancy prior to the transfer, acquired a full half interest as a result of the transfer without giving a full consideration in money's worth. (R. 231, 232-233.) As to the community property acquired after July 29, 1927, the court reversed the Tax Court on the theory that in relinquishing to his wife his powers of management and control over her property, the decedent did not transfer an interest to his wife within the meaning of Section 811 (c) and (d)(5) of the Code, and that Section 81.15 of Treasury Regulations 105, which applies Section 811 (d)(5) to a division of community property into the separate property of the spouses, is not a rational interpretation of the statute (R. 229-231). The court remanded the case for the determination of the part of the property which was acquired before July 29, 1927, and which under its decision is properly includible in the gross estate (R. 233).

REASONS FOR GRANTING THE WRIT

1. Section 811 (d)(5) of the Internal Revenue Code (Appendix, *infra*, p. 19) was one of several complementary provisions enacted in 1942 in order to put an end to "the preferential treatment" previously "accorded by the federal estate tax laws to community property." *Fernandez* v. *Wiener*, 326 U. S. 340, 350-351; see also *United States* v. *Rompel*, 326 U. S. 367. But the construction put upon that section by the court below frustrates the Congressional purpose to eliminate "special estate tax

privileges enjoyed by virtue of the community property system". S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 231-232 (1942-2 Cum. Bull. 504, 673-674); see also H. Rep. No. 2333, 77th Cong., 2d Sess., p. 160 (1942-2 Cum. Bull. 372, 489).

Under Section 811 (e)(2) (Appendix, *infra*, pp. 19-20), one of the 1942 provisions, community property held by the community at the time of decedent's death must be included in its entirety in the decedent's estate (with exceptions not here material). *Fernandez* v. *Wiener, supra; United States* v. *Rompel, supra.* As explained in the *Wiener* case, the basis for inclusion of the half of the property "owned" by the wife is the shifting to her at decedent's death of his expansive control over her property, with the result that she acquires for the first time full and exclusive possession. By Section 811 (d)(5), Congress intended to accomplish inclusion of the entire community property where it was transferred by the community during life in contemplation of death, since such a transfer is deemed a substitute for a testamentary disposition. *United States* v. *Wells,* 283 U. S. 102, 116-117. But the court below has rendered a decision, with respect to the community property, which ignores the intention of Congress expressed in Section 811 (d)(5), and which authorizes exemption from tax of the wife's half of the community property, control over which was transferred to her in contemplation of death, even though the

transfer of this control to her at death would have required inclusion of her half of the property in the gross estate.

The effect of the decision below is thus to reopen the door to inequality which Congress, in 1942, set out to shut. The statutory distortion thus accomplished cannot be dismissed as one engendered by, or confined to, the peculiarities of post-1927 California law. For the change worked in California law in 1927 had the effect not of creating a new and different type of community property; the effect of the 1927 change was to bring California's system more clearly into line with that of other community property states.[2]

2. Nor is the decision of the court below of significance in the field of estate taxation alone. Section

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[2] Prior to July 29, 1927, a wife in California was regarded as having only a so-called expectancy in the community property. *United States* v. *Robbins*, 269 U.S. 315; *Gillis* v. *Welch*, 80 F. 2d 165 (C.A. 9th), certiorari denied, 297 U.S. 722. On that date she acquired, under Section 161a of the Civil Code of California (Appendix, *infra*, p. 16), what was described as a "present existing and equal" interest in the community property acquired thereafter. But this interest was under the management and control of the husband as provided in Sections 172 and 172a of the Civil Code (Appendix, *infra*, pp. 16-17). And these sections gave the husband full management and control, with like absolute power of disposition, other than testamentary, as he has over his separate property, except that he can not give away the personal property without a valuable consideration or dispose of the home furnishings and apparel of the wife or minor children without the written consent of the wife. The wife also must join in executing any conveyance, or lease in excess of one year, of community real estate.

Under these sections, the community property, both real and personal, is liable for the husband's separate debt and tort liabilities. *Grolemund* v. *Caffarata*, 17 Cal. 2d 679, certiorari denied, 314 U.S. 612; *Estate of Coffee*, 19 Cal. 2d 248.

1000 (d) of the Internal Revenue Code (Appendix, *infra*, p. 23) subjects to gift tax, as a transfer by the husband, community property transferred by husband and wife, which is not economically attributable to the wife.[3] Regulations issued under both this statute and Section 811 (d) (5), here involved, provide that the statutes apply to the division of community property into separate property of the spouses. Section 81.15 of Treasury Regulations 105 and Section 86.2 of Treasury Regulations 108 (both Appendix, *infra*, pp. 26-29). Because the estate and gift tax statutes and regulations have virtually identical provisions, it is clear that the decision in this case, although dealing nominally only with the estate tax section and regulation, will apply equally to a similar question arising under the gift tax provisions.[4]

We are advised by the Treasury Department that there are pending at the present time in the courts

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Thus, the decedent's control over the post-1927 community property is at least equal to the husband's control over the community property in other states, and the wife's present interest in the post-1927 community property is substantially equivalent to the wife's interest in other states. *Fernandez* v. *Wiener*, 326 U.S. 340; *United States* v. *Rompel*, 326 U.S. 367; *Poe* v. *Seaborn*, 282 U.S. 101; *Goodell* v. *Koch*, 282 U.S. 118.

[3] This exception is the same as that attaching in the case of the estate tax, but, as indicated by the Tax Court's findings, *supra*, p. 4, it is not here relevant.

[4] The opinion in this case held the estate tax regulation, which corresponds to the gift tax regulation (Section 86.2 of Treasury Regulations 108), invalid. In so doing, the court noted that in *Mills* v. *Commissioner*, 12 T.C. 468, the Tax Court had held the similar gift tax regulation invalid. (R. 231.) The *Mills* case is now pending on appeal in the Ninth Circuit Court of Appeals, the same court which decided this case.

and before it at least 13 estate tax cases and 28 gift tax cases which present this question. Additional cases may be expected to develop. A decision by this Court of the present case will enable these cases, and others which may arise later, to be disposed of promptly and finally.

Although Section 811 (d) (5) is not effective with respect to estates of decedents dying after December 31, 1947 (Section 351 (a), Revenue Act of 1948 (Appendix, *infra*, p. 26)), and Section 1000 (d) is not effective with respect to transfers by gift made after April 2, 1948, the decision of the court below has great importance beyond the effective dates of these particular provisions of the Code. The gift tax is calculated at a graduated rate upon a base which takes into account the aggregate sum of the net gifts for the taxable year and for the preceding calendar years commencing with 1932. Section 1001 of the Internal Revenue Code (Appendix, *infra*, pp. 23-24). Thus, the amount of the gift tax due in 1948 and succeeding years will depend upon whether community property divided by the husband and wife between January 1, 1943, and April 2, 1948, is included in the aggregate base as a taxable transfer by gift. Under the decision in this case, such property would not be included in the gift tax base and gift taxes payable in 1948 and succeeding years would to that extent be reduced.

Moreover, the decision in this case will upset the calculation of the marital deduction allowed by Section 812 (e) of the Internal Revenue Code (Ap-

pendix, *infra,* pp. 20-22) for estate tax purposes in the case of decedents dying after December 31, 1947, and that allowed by Section 1004 (a)(3) of the Internal Revenue Code (Appendix, *infra,* pp. 24-26) for gift tax purposes in the case of gifts after April 2, 1948. The purpose of the marital deduction, added by Sections 361 and 372 of the Revenue Act of 1948, was to place residents of common law states in an equivalent position for estate and gift tax purposes with residents of community property states. H. Rep. No. 1274, 80th Cong., 2d Sess., pp. 24-26 (1948-1 Cum. Bull. 241, 260-261); S. Rep. No. 1013, 80th Cong., 2d Sess., pp. 26-29 (1948-1 Cum. Bull. 285, 303-306). To carry out this purpose, there is allowed in computing the net taxable estate and the net gifts subject to gift tax a deduction amounting to half the value of any interest in property passing from the decedent or the donor to his spouse (Section 812 (e)(1)(A) and (H); Section 1004 (a)(3)(A)) but community property is excluded from the benefit of this deduction (Section 812 (e)(2)(B); Section 1004 (a)(3)(F)(i)). For this purpose, community property includes separate property acquired as a result of the division of community property between the spouses during 1942 and after April 2, 1948, the effective date of the Revenue Act of 1948 (Section 812 (e)(2)(C); Section 1004 (a) (3)(F)(iii)). Thus, separate property acquired as a result of the division of community property between January 1, 1943, and April 2, 1948, is not to be treated as com-

munity property. The reason for this, obviously, was that Congress assumed, in accordance with Section 1000 (d) of the Code and Section 86.2 of Treasury Regulations 108, that a gift tax would have been paid on the transfer, by division, to the spouse of the decedent or donor of a full half interest in the property, and thus that the half of the property acquired by the decedent or donor in the division has the same status as the separate property held by a decedent or donor in a common law state. See Surrey, *The Revenue Act of 1948,* 61 Harv. L. Rev. 1097, 1124-1125 (1948). It is of course apparent that the decision of the Court of Appeals in this case precludes a gift tax on the division of community property during the period January 1, 1943, to April 2, 1948 (see *supra,* note 4, p. 9), and it thus disrupts to that extent the Congressional plan for a marital deduction which will place all decedents and donors on an equal plane with decedents and donors of community property states for estate and gift tax purposes. Having an effect directly contrary to that intended by Congress, the decision below gives a decided tax advantage, contrary to the Congressional intent, to decedents and donors who divided community property during this period. The importance of the case in this aspect is obvious.

3. In declaring Section 81.15 of Treasury Regulations 105 invalid as applied to the community property acquired after July 29, 1927, the Court

of Appeals erroneously disregarded the principles established by numerous decisions of this Court that a Treasury regulation must be sustained unless it is plainly inconsistent with the statute and that, as a contemporaneous construction by the authority charged with administration of the statute, it is not to be overruled except for weighty reasons. See, e.g., *Commissioner* v. *South Texas Co.*, 333 U. S. 496, 501. The regulation here should have been sustained under these principles.

As already noted, the regulation provides that a division of community property into separate property of the spouses is a transfer of property by the decedent within Section 811 (d)(5) of the Code. The regulation merely makes explicit in this respect what is indicated by the language of Section 811 (d)(5) itself. The basic premise of that section is that the decedent has a sufficient property interest in his spouse's half of the community property to require inclusion of its value in the gross estate when it has been conveyed *inter vivos* in a transfer described in Section 811 (c) or (d). If the termination, in contemplation of death, of the decedent's interest in the spouse's half of the community property is a sufficient basis for the tax when the property is transferred to a third person, as must be conceded if Section 811 (d)(5) of the Code is to have any application at all, there is equally a taxable transfer when, in contemplation of death, the decedent terminates his interest in the surviving spouse's community half by transferring

that half to his wife as separately owned property held in common. No rational reason can be suggested for treating the termination of decedent's control over his wife's community half interest as the transfer of property by decedent when the transferee is a third person and as not the transfer of property by the decedent when the transferee is the wife. Cf. *Fernandez* v. *Wiener,* 326 U. S. 340, where the termination by death of decedent's control over community property in favor of his wife was held sufficient to warrant inclusion of the value of the wife's half of the property in the gross estate of decedent under Section 811(e)(2) of the Code, as added by Section 402(b) of the Revenue Act of 1942 (Appendix, *infra,* pp. 19-20). Cf. also Paul, *Federal Estate and Gift Taxation* (1946 Supplement), pp. 210-211, 719-721. The regulation is plainly a valid, and indeed a required, rule under the statutory language, and it should have been sustained.

Moreover, this regulation and the substantially identical gift tax regulation have received the approval of Congress. As already explained, *supra,* pp. 10-12, one element in the determination of the marital deduction for estate and gift tax purposes under Sections 812(e)(2) and 1004 (a)(3) of the Code is the exclusion from the category of community property of separate property acquired from the division of community property between January 1, 1943, and April 2, 1948, on the theory that the transfer to the wife involved in this

division would have been taxed. Thus, Congress accepted the regulations as announcing a valid rule under Sections 811(d) and 1000(d) and gave effect to it in the new statute. Cf. *Wilmette Park District* v. *Campbell,* No. 75, this Term, slip opinion, pp. 6-7.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

DECEMBER, 1949.

Deering, Civil Code of California (1949):

§ 161a. [*Interests in community property.*] The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband as is provided in sections 172 and 172a of the Civil Code. This section shall be construed as defining the respective interests and rights of husband and wife in community property.

§ 172. [*Management of community personal property: Limitations: Consent of wife.*] The husband has the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate estate; provided, however, that he cannot make a gift of such community personal property, or dispose of the same without a valuable consideration, or sell, convey, or encumber the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the wife or minor children that is community, without the written consent of the wife.

§ 172a. [*Management of community real property: Joinder of wife in conveyance: Presumption of validity: Action to avoid instrument: Limitations.*] The husband has the management and control of the community real

property, but the wife, either personally or by duly authorized agent, must join with him in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered; provided, however, that nothing herein contained shall be construed to apply to a lease, mortgage, conveyance, or transfer of real property or of any interest in real property between husband and wife; provided, also, however, that the sole lease, contract, mortgage or deed of the husband, holding the record title to community real property, to a lessee, purchaser or encumbrancer, in good faith without knowledge of the marriage relation shall be presumed to be valid. No action to avoid any instrument mentioned in this section, affecting any property standing of record in the name of the husband alone, executed by the husband alone, shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the county in which the land is situate, and no action to avoid any instrument mentioned in this section, affecting any property standing of record in the name of the husband alone, which was executed by the husband alone and filed for record prior to the time this act takes effect, in the recorder's office in the county in which the land is situate, shall be commenced after the expiration of one year from the date on which this act takes effect.

Internal Revenue Code:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * * *

(c) *Transfers in Contemplation of, or Taking Effect at Death.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed

to have been made in contemplation of death within the meaning of this subchapter;

(d) [As amended by Section 402 (a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Revocable Transfers*—

* * * * *

(5) *Transfers of community property in contemplation of death, etc.*—For the purposes of this subsection and subsection (c), a transfer of property held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, shall be considered to have been made by the decedent, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse.

(e) [As amended by Section 402 (b) of the Revenue Act of 1942, *supra*] *Joint and Community Interests.*—

* * * * *

(2) *Community interests.*—To the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, except such part thereof as

may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition.

* * * * *

(26 U. S. C. 1946 ed., Sec. 811.)

SEC. 812. NET ESTATE.

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

* * * * *

(e) [As added by Section 361 of the Revenue Act of 1948, c. 168, 62 Stat. 110] *Bequests, Etc., to Surviving Spouse.*—

(1) *Allowance of Marital Deduction.*—

(A) In General.—An amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

* * * * *

(H) Limitation On Aggregate Of Deductions.—The aggregate amount of the deduc-

tions allowed under this paragraph (computed without regard to this subparagraph) shall not exceed 50 per centum of the value of the adjusted gross estate, as defined in paragraph (2).

(2) *Computation of Adjusted Gross Estate.*—

(A) General Rule.—Except as provided in subparagraph (B) of this paragraph the adjusted gross estate shall, for the purposes of paragraph (1)(H), be computed by subtracting from the entire value of the gross estate the aggregate amount of the deductions allowed by subsection (b) of this section.

(B) Special Rule In Cases Involving Community Property.—If the decedent and his surviving spouse at any time held property as community property under the law of any State, Territory, or possession of the United States, or of any foreign country, then the adjusted gross estate shall, for the purposes of paragraph (1)(H), be determined by subtracting from the entire value of the gross estate the sum of:

(i) the value of property which is at the time of the death of the decedent held as such community property; and

(ii) the value of property transferred by the decedent during his life, if at the time of such transfer the property was held as such community property; and

(iii) the amount receivable as insurance under policies upon the life of the decedent to the extent purchased with premiums or other consideration paid out of property held as such community property; and

* * * * *

(C) Same — Conversion Into Separate Property.—

(i) If during the calendar year 1942 or after the date of the enactment of the Revenue Act of 1948, property held as such community property (unless considered by reason of subparagraph (B) of this paragraph as not so held) was by the decedent and the surviving spouse converted, by one transaction or a series of transactions, into separate property of the decedent and his spouse (including any form of co-ownership by them), the separate property so acquired by the decedent and any property acquired at any time by the decedent in exchange therefor (by one exchange or a series of exchanges) shall, for the purposes of clauses (i), (ii), and (iii) of subparagraph (B), be considered as "held as such community property".

* * * * *

(26 U. S. C. 1946 ed., Sec. 812.)

SEC. 1000. IMPOSITION OF TAX.

(a) For the calendar year 1940 and each calendar year thereafter a tax, computed as

provided in section 1001, shall be imposed upon the transfer during such calendar year by any individual, resident or non-resident, of property by gift. * * *

* * * * *

(d) [As added by Section 453 of the Revenue Act of 1942, *supra,* and amended by Section 371 of the Revenue Act of 1948, *supra*] *Community Property.*—All gifts of property held as community property under the law of any State, Territory, or possession of the United States, or any foreign country shall be considered to be the gifts of the husband except that gifts of such property as may be shown to have been received as compensation for personal services actually rendered by the wife or derived originally from such compensation or from separate property of the wife shall be considered to be gifts of the wife. This subsection shall be applicable only to gifts made after the calendar year 1942 and on or before the date of the enactment of the Revenue Act of 1948.

(26 U. S. C. 1946 ed., Sec. 1000.)

SEC. 1001. COMPUTATION OF TAX.

(a) The tax for each calendar year shall be an amount equal to the excess of—

(1) a tax, computed in accordance with the Rate Schedule hereinafter set forth, on the aggregate sum of the net gifts for such calendar year and for each of the preceding calendar years, over

(2) a tax, computed in accordance with the said Rate Schedule, on the aggregate sum of the net gifts for each of the preceding calendar years.

* * * * *

(b) For the purpose of this section the term "preceding calendar years" means the calendar year 1932 and all calendar years intervening between the calendar year 1932 and the calendar year for which the tax is being computed.

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(26 U.S.C. 1946 ed., Sec. 1001.)

SEC. 1004. [As amended by Section 455 of the Revenue Act of 1942, *supra*]. DEDUCTIONS.

In computing net gifts for the calendar year 1942 and preceding calendar years, there shall be allowed (except as otherwise provided in paragraph (1) of subsection (a)) such deductions as are provided for under the gift tax laws applicable to the years in which the gifts were made.

In computing net gifts for the calendar year 1943 and subsequent calendar years, there shall be allowed as deductions:

(a) *Residents.*—In the case of a citizen or resident—

* * * * *

(3) [As added by Section 372 of the Revenue Act of 1948, *supra*] *Gift to spouse.*—

(A) In General.—Where the donor transfers during the calendar year and after the date of the enactment of the Revenue Act of 1948) by gift an interest in property to a donee who at the time of the gift is the donor's spouse—an amount with respect to such interest equal to one-half of its value.

* * * * *

(F) Community Property.—

(i) A deduction otherwise allowable under this paragraph shall be allowed only to the extent that the transfer can be shown to represent a gift of property which is not, at the time of the gift, held as community property under the law of any State, Territory, or possession of the United States, or of any foreign country.

* * * * *

(iii) If during the calendar year 1942 or after the date of the enactment of the Revenue Act of 1948, property held as such community property (unless considered by reason of clause (ii) as not so held) was by the donor and the donee spouse converted, by one transaction or a series of transactions, into separate property of the donor and such spouse (including any form of co-ownership by them), the separate property so acquired by the donor and any property

acquired at any time by the donor in exchange therefor (by one exchange or a series of exchanges) shall, for the purposes of clause (i), be considered as "held as community property".

* * * * *

(26 U.S.C. 1946 ed., Sec. 1004.)

Revenue Act of 1948, c. 168, 62 Stat. 110:

SEC. 351. REPEAL OF COMMUNITY PROPERTY ESTATE TAX AMENDMENTS.

(a) Effective with respect to estates of decedents dying after December 31, 1947, sections 811(d)(5), 811(e)(2) and 811(g)(4) of the Internal Revenue Code (relating to community property) are hereby repealed.

* * * * *

Treasury Regulations 105, promulgated under the Internal Revenue Code:

SEC. 81.15 [As amended by T.D. 5239, 1943 Cum. Bull. 1081, 1084] *Transfers during life.*— * * *

In the case of estates of decedents dying after October 21, 1942, a transfer to a third party or third parties of property held as community property by the decedent and spouse under the law of any State, Territory, or possession of the United States, or any foreign country, shall be considered, in accordance with section 811 (d)(5), as added by section 402(a) of the Revenue Act of 1942, for the purposes of this section and sections 81.16 through 81.21, inclusive, to have been made by the decedent, except such part thereof as may be shown to have been

received as compensation for personal services actually rendered by the spouse or derived originally from such compensation or from separate property of the spouse. The same statutory provisions apply in the case of a division of such community property between the decedent and spouse into separate property, and in the case of a transfer of any part of the community property into separate property of such spouse; in such cases, the value of the property which becomes the separate property of such spouse, with the exception stated in the preceding sentence, shall be included in the gross estate of the decedent under section 811(c) or section 811(d), if the other conditions of taxability under such sections exist. If in the case of a decedent who died after October 21, 1942, property held as community property by such decedent and his spouse is transferred to themselves as joint tenants or as tenants by the entirety, the transfer is taxable under section 811(c), except with respect to such part of the property so transferred as is attributable to the spouse under the exception stated in the first sentence of this paragraph. With respect to the meaning of property derived originally from such compensation or from separate property of the spouse and to the identification required, see section 81.23.

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Treasury Regulations 108, promulgated under the Internal Revenue Code:

SEC. 86.2 *Transfers Reached.* * * *

* * * * *

(c) *Transfers of community property after 1942.*—During the calendar year 1943 and any calendar year thereafter any gift of property held as community property under the law of any State, Territory, or possession of the United States, or any foreign country constitutes a gift of the husband for the purpose of the gift tax statute (regardless of whether under the terms of the transfer the husband alone or the wife alone is designated as the donor or whether both are so designated as donors), except to the extent that such property is shown (1) to have been received as compensation for personal services actually rendered by the wife or derived originally from such compensation, or (2) to have been derived originally from separate property of the wife. The entire property comprising the gift is prima facie a gift of the husband, but any portion thereof which is shown to be economically attributable to the wife as prescribed in the preceding sentence constitutes a gift of the wife.

The rule stated in the preceding paragraph applies alike to a transfer by way of gift of community property to a third party or third parties, to a division of such community property between husband and wife into the separate property of each, and to a transfer by the husband and wife of any part of such community property into the separate property either of the husband or of the wife, or into a joint estate or tenancy by the entirety of both spouses. In all of such cases the value of the property so transferred or so divided, as the

case may be, is a gift by the husband to the extent that it exceeds the aggregate amount of the value of that portion which is shown to be economically attributable to the wife, as prescribed in the preceding paragraph, and of the value of the husband's interest in such property after such transfer or division. The value of the property so transferred or so divided, as the case may be, is a gift by the wife to the extent that the portion of such value which is shown to be economically attributable to her, as prescribed in the preceding paragraph, exceeds the value of her interest in such property after such transfer or division. See examples (5) and (6) of subsection (*a*) of this section. No gift tax results from a transfer on or after January 1, 1943, of separate property of either spouse into community property.

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